

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA WILSON,

Plaintiff/Counter-Defendant-
Appellee,

v

KELSEY-HAYES COMPANY, d/b/a TRW
AUTOMOTIVE, INC.,

Defendant/Counter-Plaintiff-
Appellant,

and

TAMMY MITCHELL,

Defendant-Appellant,

and

JOSEPH CANTIE,

Defendant.

UNPUBLISHED

January 14, 2014

No. 315757

Wayne Circuit Court

LC No. 12-015299-CD

Before: M.J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Appellants appeal by leave granted the trial court's order denying their motion for partial summary disposition. We reverse.

I. BASIC FACTS

This case arises from plaintiff's allegation that her employment was wrongfully terminated with Kelsey-Hayes Company on April 15, 2009. Kelsey-Hayes had a Problem Resolution Policy ("PRP") in effect, which provided that the PRP "must be used before an employee can pursue resolution of a covered dispute through the court system" and applies to "all current and former U.S. payroll employees."

Nearly two years later, on April 10, 2011, plaintiff submitted her dispute under the PRP, alleging, *inter alia*, that her termination constituted impermissible discrimination. Her attorney submitted two subsequent letters, clarifying the nature of the dispute. The final letter, dated April 25, 2011, put forth three claims: violation of the Michigan Elliott-Larsen Civil Rights Act (“ELCRA”), MCL 37.2101 *et seq.*, violation of Michigan public policy, and violation of a January 2002 Settlement Agreement between the employer and its employees and agents. The only person’s name referenced in the body of the letter was plaintiff’s.

On May 9, 2011, plaintiff and Kelsey-Hayes entered into a tolling agreement. The caption on the agreement listed Barbara Wilson as “claimant” and Kelsey-Hayes Company as “respondent”; there were no other parties mentioned. The agreement states, in pertinent part, the following:

Claimant, Barbara Wilson (“Claimant”), by her attorney O’Neal O. Wright, O’Neal O. Wright and Associates, P.C. and Respondent, Kelsey-Hayes Company (the “Company”), by its attorney Brian A. Paton, hereby stipulate to the following:

1. On April 12, 2011, [sic – April 10] Claimant submitted a Request for ADR form asserting certain claims, thereby instituting a proceeding under Respondent’s Alternative Dispute Resolution (“ADR”) procedure. On April 20, 2011, Claimant’s counsel submitted a letter removing, clarifying and delineating Claimant’s prior claims. On April 25, 2011, Claimant’s counsel submitted a letter further removing, clarifying and delineated Claimant’s prior claims. A true copy of Claimant counsel’s April 25, 2011 letter is attached as Exhibit A.

2. Claimant acknowledges that, under the terms of Respondent’s ADR procedure, Claimant is bound to proceed through arbitration before she would have the right to file an action in a court of competent jurisdiction. Respondent acknowledges Claimant’s interest in preserving her claims from the further running of any applicable statutes of limitations.

* * *

4. Therefore, effective upon the date of the final signature required below, and for a period of 30 days after the issuance of the arbitrator’s decision in this matter, the parties hereby agree to toll the further running of any relevant statutes of limitations for any claim Claimant asserted in Exhibit A. . . .

The agreement is then signed by Brian A. Paton “For Kelsey-Hayes Company” and by O’Neal O. Wright “For Barbara Wilson.”

On October 31, 2012, the arbitrator denied plaintiff's claims "in their entirety."¹

On November 16, 2012, plaintiff filed her complaint in circuit court, naming three defendants: Kelsey-Hayes Company, Tammy Mitchell, and Joseph Cantie.² In her complaint, plaintiff alleged two violations of the ELCRA (race-based discrimination and retaliation), two instances of breach of contract (the first based on a 2002 settlement agreement between plaintiff and TRW, and the second on "implied terms of employment"), and one instance of violation of public policy.

On December 17, 2012, defendants moved, under MCR 2.116(C)(7), for partial summary disposition with respect to the individual defendants Mitchell and Cantie. Defendants argued that the three-year statute of limitations period had expired with respect to those defendants because the tolling agreement between plaintiff and Kelsey-Hayes applied only to plaintiff and Kelsey-Hayes. The parties thereafter stipulated to the dismissal of Cantie as a party.

At the March 8, 2013, motion hearing, the trial court denied defendants' motion. The trial court relied upon the language in the tolling agreement that provided that "Respondent acknowledges Claimant's interest in preserving her claims from the further running of any applicable statutes of limitations." The court noted that this portion of the tolling agreement did not reference Kelsey-Hayes or Mitchell

or . . . anybody else connected with the entity. It says that the respondent acknowledges claimant's interest in preserving her claims. It doesn't say her claims against Kelsey-Hayes or claims against Mitchell. It says in preserving her claims from further running of any applicable statute of limitations. Motion for summary disposition denied.

II. ANALYSIS

Defendants argue that the trial court erred when it denied their motion for partial summary disposition with respect to plaintiff's claims against defendant Mitchell, in her individual capacity because the statute of limitations barred those claims. We agree.

"This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldúa v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). "A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is legally barred. The motion may, but need not, be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. The allegations of the complaint are accepted as true unless contradicted by documentary evidence." *Begin v Mich Bell Tel Co*, 284 Mich App 581, 598; 773 NW2d 271

¹ Kelsey-Hayes had raised some counter-claims in the ADR process as well, but the arbitrator denied those claims too.

² In her complaint, plaintiff states that at the time of her employment being terminated, she was Mitchell's administrative assistant. Plaintiff also states that Cantie was the Chief Financial Officer, who approved of Mitchell's decision to terminate plaintiff's employment.

(2009), overruled on other grounds *Admire v Auto-Owners Ins Co*, 494 Mich 10; 831 NW2d 849 (2013). “Summary disposition is appropriate under MCR 2.116(C)(7) if the claim is barred because of the statute of limitations.” *Tice Estate v Tice*, 288 Mich App 665, 668; 795 NW2d 604 (2010).

This issue also involves the proper interpretation of a contract, which this Court reviews de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

In interpreting a contract, it is a court’s obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties’ intent as a matter of law. [*In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008) (citations omitted).]

Plaintiff acknowledges that she filed her complaint in circuit court more than three years after her employment was terminated. She also acknowledges that, but for the tolling agreement, her claims against Mitchell would have been barred because of the lapse of the three-year statute of limitations period, MCL 600.5805(10). Thus, the sole issue is whether Mitchell is bound by the tolling agreement executed by plaintiff and Kelsey-Hayes.

“It goes without saying that a contract cannot bind a nonparty.” *AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 80; 811 NW2d 4 (2011), quoting *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002). However, nonsignatories of agreements can still be bound by that agreement “pursuant to ordinary contract-related legal principles, including incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel.” *AFSCME Council 25*, 292 Mich App at 81.

There is no dispute that Mitchell is not named on the tolling agreement and that she did not sign the agreement. In fact, the evidence is clear that the agreement contemplated only two parties: plaintiff as the “claimant” and Kelsey-Hayes as the “respondent.” These designations are listed no less than three times in the two-page document—in the caption, in the opening paragraph, and in the signature block. Moreover, there is no evidence to suggest that any of the principles of incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel are applicable.

From the above principles, plaintiff argues that the PRP was “incorporated into the Tolling Agreement,” and, therefore, the tolling agreement “must be read with the inclusion of the [PRP].” Plaintiff surmises that because Mitchell benefited from the PRP to the extent it protected her from having to defend herself against claims plaintiff filed against her in circuit court before arbitration was completed, Mitchell was bound by the tolling agreement. We disagree.

Plaintiff misapprehends the proper focus in this incorporation-by-reference analysis. The Second Circuit, in the context of arbitration agreements, noted, “A nonsignatory may compel arbitration against a party to an arbitration agreement when that party *has entered into a separate contractual relationship* with the nonsignatory *which incorporates the existing arbitration*

clause.” *Thomson-CSF, SA v American Arbitration Ass’n*, 64 F3d 773, 777 (CA 2, 1995) (emphasis added). Hence, for our case, what is important is whether Mitchell somehow incorporated or adopted the terms of the tolling agreement into another agreement. There is no evidence that she did any such thing. The fact that *Kelsey-Hayes and plaintiff* arguably incorporated the PRP into *their* tolling agreement does not mean that *Mitchell* was a party to the tolling agreement. Thus, even assuming that Mitchell was a “party” to the PRP, there is no evidence that she intended to adopt the terms of Kelsey-Hayes and plaintiff’s tolling agreement.

The trial court’s determination that Mitchell was bound by the tolling agreement because plaintiff and Kelsey-Hayes intended to toll the limitations period for *all* of plaintiff’s claims, regardless of who the claims were asserted against, ignores the fact that plaintiff and Kelsey-Hayes were powerless to toll claims against Mitchell without Mitchell’s consent. See *AFSCME Council 25*, 292 Mich App at 80.³

Plaintiff also argues that Mitchell was a third-party beneficiary of the tolling agreement because she benefitted from the PRP to the extent it prevented plaintiff from suing in circuit court before arbitration was completed, and, therefore, the tolling agreement should be read to apply to her. As previously discussed, the PRP is not relevant to determining the parties of the tolling agreement. Further, plaintiff’s premise that Mitchell was a third-party beneficiary of the tolling agreement is without merit because a third-party beneficiary is granted exceptional standing to seek enforcement of a contract to which she was not a party; plaintiff cites no law to support her argument that third-party beneficiaries can themselves be sued. That is because third-party beneficiaries have no duties or obligations thrust upon them (and, hence, cannot breach a contract); instead, as the name implies, they merely are the beneficiaries of someone else’s promise. See MCL 600.1405.⁴

Moreover, plaintiff’s theory fails in any event because Mitchell is not a third-party beneficiary. Here, Kelsey-Hayes’s consent to toll the statute of limitations with respect to

³ Although not dispositive for our resolution of the issue on appeal, we also note that the tolling agreement is explicit in that it was created with the “claimant” being plaintiff and the “respondent” being Kelsey-Hayes. To suggest that the agreement contemplated *other* respondents is reading other terms into an express agreement, which courts are not allowed to do. See *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000) (stating that a court is to read a contractual agreement as a whole and apply its plain language).

⁴ MCL 600.1405(1):

Any person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

plaintiff's claims against it—in effect, giving plaintiff permission to sue it—was the promise. The beneficiary of that promise was plaintiff—not Mitchell—since it was for plaintiff's benefit that the promise was made.

Plaintiff next argues that the tolling agreement's provision that "Respondent acknowledges Claimant's interest in preserving her claims from the further running of any statutes of limitations" created a latent ambiguity, which permits the use of extrinsic evidence to determine the actual intent of the parties. This argument is without merit. As already discussed, the contract is not ambiguous. Furthermore, whether Kelsey-Hayes and plaintiff intended to include plaintiff's claims against Mitchell is not relevant. What is relevant is whether Mitchell was a party to the tolling agreement, and she was not.

We reverse the trial court's order denying defendants' motion for partial summary disposition and remand with instructions to enter an order granting the motion. We do not retain jurisdiction. Appellants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood